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TO BE ARGUED BY: JAY B. HASHMALL
TIME REQUESTED: 10 Minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

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In the Matter of the Application of MARIO M.
CASTRACAN and VINCENT F. BONELLI, acting
Pro Bono Publico,

Index No.
6056/90

Petitioners-Appellants,

Albany Co.

-against-

for an Order pursuant to Sections 16-
100, 16-102, 16-104, 16-106 and 16-116
of the Election Law,

-vs-

ANTHONY J. COLAVITA, Esq., Chairman,
WESTCHESTER REPUBLICAN COUNTY COMMITTEE, GUY
T. PARISI, Esq., DENNIS MEHIEL, Esq., Chairman,
WESTCHESTER DEMOCRATIC COUNTY COMMITTEE,
RICHARD K. WEINGARTEN, Esq., LOUIS A. BREVETTI,
Esq., Hon. FRANCIS A. NICOLAI, HOWARD MILLER,
Esq., ALBERT J. EMANUELLI, Esq., R. WELLS
STOUT, HELENA DONAHUE, EVELYN AQUILLA,
Commissioners constituting the NEW YORK STATE
BOARD OF ELECTIONS, ANTONIA R. D'APICE,
MARION B. OLDI, Commissioners constituting
the WESTCHESTER COUNTY BOARD OF ELECTIONS,

Respondents-Respondents,

for an Order declaring invalid the
Certificates purporting to designate
Respondents Hon. FRANCIS A. NICOLAI and
HOWARD MILLER, Esq. as candidates for the
office of Justice of the Supreme Court of the
State of New York, Ninth Judicial District,
and the Petitions purporting to designate
ALBERT J. EMANUELLI, Esq. a candidate for the
office of Surrogate of Westchester County to
be held in the general election of November
6, 1990.

-----X
BRIEF OF RESPONDENTS WESTCHESTER DEMOCRATIC COUNTY
COMMITTEE, DENNIS MEHIEL and RICHARD K. WEINGARTEN

HASHMALL, SHEER, BANK & GEIST
235 MAMARONECK AVENUE
WHITE PLAINS, NEW YORK 10605
(914) 761-9111

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PRELIMINARY STATEMENT

This is an appeal brought by the Petitioners in a hybrid election law/declaratory judgment action with the Petitioners claiming to be acting pro bono publico against various Republican and Democratic officials and three judicial candidates running for the Supreme Court, 9th Judicial District, one nominated for Westchester County Surrogate Court and various boards of election.

The lower court by the Hon. Lawrence Kahn, Justice after hearing lengthy oral argument on Monday, October 15, 1990, granted the Respondents' request to dismiss the proceeding and this appeal followed.

COUNTER-STATEMENT OF FACTS

This is a hybrid proceeding by two petitioners claiming to be acting pro bono publico seeking to invalidate the nominations of three candidates for judicial office and seeking to set aside and nullify two certificates of nomination for judicial office in the 9th Judicial District and to require new judicial conventions of the Republican and Democratic Party in said judicial district. Further, the Petition also seeks to have declared invalid resolutions adopted by the Executive Committees of the Respondent Westchester County Republican Committee and Respondent Westchester County Democratic Committee as an alleged "illegal

contract".

The Petitioners, although claiming to be bringing this proceeding in some representative capacity for the public good also claim to have standing as enrolled members of the Republican and Democratic parties in Westchester County respectively. Neither Petitioner claims to be or was a candidate for any of the offices challenged, was a party chairman or party official of either the Republican or Democratic or any other political party nor was either a judicial delegate or judicial alternate to either the Republican or Democratic judicial conventions nor candidate therefore.

POINT I

THE LOWER COURT PROPERLY DISMISSED
THE PROCEEDING AS FAILING TO STATE
A CAUSE OF ACTION.

A review of the Petition filed clearly indicates that Petitioners have failed to state a cause of action. Taking all of the non-conclusory allegations as true for the purposes of dismissal, the Petition fails to state a cause of action as an election proceeding challenging Certificates of Nomination and a judicial convention or as a declaratory judgment proceeding seeking to invalidate resolutions as illegal contracts. The Petitioners failed to cite any statutory authority for the relief requested.

A review of the Resolution annexed to the Petition indicates that it is far from an enforceable contract. A resolution by its very nature states the intentions and goals of a group and this particular resolution as adopted by an executive committee was not and could not be binding either on an entire county committee nor on any of the many various mechanisms utilized to nominate candidates for judicial office. Indeed as set forth in the Respondents' Answers the very fact that the challenged resolution only addresses one of the three Supreme Court vacancies that were voted on in November of 1990 defeats the entire argument of the Petitioners that the Resolution disenfranchised voters and pre-determined the election of all of the Supreme Court Justices last November. The fact remains that were

three vacancies for which there were five (5) candidates nominated who appeared on the ballot on November 6, 1990. Only one of whom is even referred to in the challenged Resolution.

Pursuant to Article 6 of the Election Law any qualified candidate could have filed Designating Petitions to run for Surrogate in Westchester County in any of the five (5) political parties or as an independent candidate. The Resolution did not and could not preclude the filing of said Designating Petitions and no candidate ever filed same or attempted to so file.

Further, in accordance with Sections 6-124 and Sections 6-126 of the Election Law, any candidate could have been nominated to run for Supreme Court Justice in the 9th Judicial District at any political party judicial convention held pursuant to the party's rules and the Election Law. The fact that four candidates in addition to Respondent Judge Nicolai were nominated at these conventions demonstrates further the lack of merit of the Petitioners' contentions.

Lastly, a review of the Petition fails to demonstrate any factual allegations supporting the request to invalidate the Certificates of Nomination of either party. As to the Respondent Westchester County Democratic Committee, the Petition contains no specific objections to said Certificate of Nomination filed by

the Democratic Party 9th Judicial District convention.

It is black letter law that any pleading must set forth in factual form allegations sufficient if proven to be true to sustain the claim asserted. The failure to set forth facts sufficient to justify the relief requested is a fatal defect and the petition should be dismissed. (Bradley v. D'Apice, 91 App. Div. 2d 691, 457, NYS 2d 139; Cregg v. Fisselbrand, 22 App. Div. 2d 342, aff'd 15 NYS 2d 748) The failure of the Petitioners to set forth any detail as to the specific objections to the Certificate of Nomination rendered their petition fatally defective.

The lower court's decision dismissing the petition as failing to state a cause of action should be affirmed.

POINT II

**PETITIONERS LACK STANDING TO
COMMENCE AN ELECTION PROCEEDING
PURSUANT TO ARTICLE 16 OF THE
ELECTION LAW.**

Section 16-102 of the Election Law permits the filing of an Election Proceeding by (1) any aggrieved candidate; (2) any party chairman; and (3) any person who has previously filed an objection.

Just reviewing the caption of this matter indicates that the Petitioners-Appellants have not stated any requisite standing other than some sort of representative standing "pro bono publico". The Election Law fails to recognize such a standing.

In the body of the Petition, the Petitioners continue to fail to allege appropriate standing. All that Petitioners allege is that they are respective members of the Republican and Democratic party as enrolled voters of said party in the County of Westchester and State of New York. The Election Law does not provide standing to such individuals.

Lastly, all the petition states as to Respondent Westchester County Democratic Party Certificate of Nomination is that the Petitioners intend to file objections to said Certificate. There is no allegation that proper and timely objections were filed, either general objections or specific objections.

Section 16-102 of the Election Law permits only three types of standing to bring an Election

proceeding. A person must either be a party chairman, an aggrieved candidate or someone who has filed timely objections. If a person is not an aggrieved candidate nor a party chairman and does not file timely objections (both general and specific) within the time prescribed by Section 6-154 (2), that person lacks standing to commence an election proceeding. (Margolis v. Larkin, 39 App. Div. 2d 951, 333 NYS 2nd 287 aff'd 30 NY 2d 976, 335, NYS 2d 430; Taylor v. Redmond, 239 App. Div. 112, 267 NYS 694; Bennett v. Justin, 77 App. Div. 2d 960, 431, NYS 2nd 853, aff'd 51 NY 2d 722, 431, NYS 2nd 1007)

Consequently, petitioners lack standing to commence an election law proceeding pursuant to Certificate 16 of the Election Law.

POINT III

THIS ELECTION PROCEEDING FAILED TO JOIN NECESSARY AND INDISPENSABLE PARTIES.

In a proceeding to invalidate a Certificate of Nomination just like a proceeding to invalidate a designating petition, the candidates named on said documents are necessary parties to the proceeding in order to protect their rights to said nomination. (See Leirer v. Canary, 133 App. Div. 2nd 196 518, NYS 2d 838; Matter of Berman v. Board of Elections of County of Nassau, 122 App. Div. 2nd 911, 506 NYS 2d 76 and Butler v. Hayduck, 37 NY 2nd 197, 373, NYS 2nd 863)

Further, when the conduct of a particular meeting is challenged the persons elected at such meeting as candidates or officers thereof are necessary parties. (Greenspan v. O'Rourke, 35 App. Div. 671, 315, NYS 2d 347 aff'd 27 NY 2d 846 316 NYS 2nd 369)

Further, these kinds of defects cannot be cured after the statute of limitations has expired. (Matter of Marin v. Board of Elections, 67 NY 2nd 634, 499 NYS 2d 644; Burns v. Board of Elections, 65 NYS 2d 949, 494, NYS 2d 105)

The failure of the Petitioners to serve all necessary parties within the ten (10) day Statute of Limitations to commence an election proceeding to challenge a certificate is a fatal defect. (See Matter of Wohl v. Miller, 63 NYS 2nd 687, 479 NYS 2d 973; Matter of Buhlman v. LeFever 83 App. Div. 2d 897, 442,

NYS 2d 531, aff'd 54 NYS 2d 775, 443, NYS 2d 154)

CONCLUSION

THE LOWER COURT'S ORDER AND JUDGMENT DISMISSING THIS PROCEEDING SHOULD BE AFFIRMED IN ITS ENTIRETY WITH COSTS AND SANCTIONS. THE PROCEEDING WAS FATALLY DEFECTIVE BECAUSE IT FAILED TO STATE A CLAIM FOR WHICH RELIEF COULD BE GRANTED, WAS BARRED BY THE STATUTE OF LIMITATION AND LACHES, FAILED TO JOIN INDISPENSABLE PARTIES AND THE PETITIONERS LACKED STATUTORY STANDING.

Dated: White Plains, New York
December 13, 1990

Yours, etc.

HASHMALL, SHEER, BANK & GEIST
Attorneys for Respondents -
Westchester County Democratic
Committee, Dennis Mehiel and
Richard Weingarten
235 Mamaroneck Avenue
White Plains, New York 10605
(914) 761-9111

Of Counsel:

JAY B. HASHMALL
GERALD K. GEIST